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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ARIEL GUERRERO ANDON, JR., Defendant and Appellant.	H042488 (Santa Clara County Super. Ct. No. F1348027)

Defendant Ariel Guerrero Andon appeals from the order denying his application to redesignate his 2013 felony conviction for unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)) as a misdemeanor under Proposition 47 (Pen. Code, § 1170.18, subd. (f)).[1]

On appeal, Andon argues the trial court erred in denying his application on the ground that this offense was not eligible for redesignation under Proposition 47. We agree, but because Andon did not present any evidence to establish that the value of the vehicle in question was less than $950, we will affirm the order without prejudice to Andon submitting a new application that addresses the valuation question.

I. FACTUAL AND PROCEDURAL BACKGROUND

Andon was charged by complaint filed on August 28, 2013, with one felony count of unlawful driving or taking of a vehicle (Veh. Code, 10851, subd. (a), count 1), and one misdemeanor count of possession of burglar tools (§ 466, count 2). The complaint

[1] Unspecified statutory references are to the Penal Code.

further alleged that Andon had suffered a prior strike conviction. (§§ 667, subds. (b)-(i), 1170.12.) On November 7, 2013, Andon pleaded no contest to count 1 and admitted the prior strike allegation. The trial court sentenced Andon to 32 months in prison and dismissed count 2.

On April 6, 2015, Andon filed a petition to redesignate his 2013 felony conviction as a misdemeanor pursuant to section 1170.18, subdivision (f). On April 7, 2015, the trial court denied the petition without a hearing on the ground that the offense of vehicle theft (Veh. Code, § 10851, subd. (a)) is not eligible for redesignation under Proposition 47.

Andon timely appealed.

II. DISCUSSION

Andon argues the trial court erred in finding him ineligible for resentencing under Proposition 47, because the voters approved that initiative so that all thefts involving property valued under $950 would be treated as misdemeanors. As explained below, although we conclude that the trial court erred in ignoring the plain language of section 490.2, we will affirm without prejudice to subsequent consideration of a petition setting forth evidence of valuation.[2]

On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 "reduced the penalties for a number of offenses." (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879 (*Sherow*).) The theft related offenses enumerated in section 1170.18, subdivisions (a) and (b) that may be designated as misdemeanors under Proposition 47 include shoplifting with a value of $950 or less (§ 459.5, subd. (a)); forgery of a document with a value of $950 or less (§ 473, subd. (b)); issuing a check for

[2] The California Supreme Court is currently considering whether Proposition 47 applies to the offense of unlawful taking or driving a vehicle (Veh. Code, § 10851) in *People v. Page*, review granted January 27, 2016, S230793. Pending further guidance from the Supreme Court, we will resolve the matter before us.

$950 or less without sufficient funds (§ 476a, subd. (b)); petty theft with a value of $950 or less (§ 490.2, subd. (a)); receiving stolen property with a value of $950 or less (§ 496, subd. (a)); and petty theft with a prior theft conviction (§ 666, subd. (a)). The offense of unlawful driving or taking of a vehicle (Veh. Code, 10851, subd. (a)) is not one of the theft related offenses listed in section 1170.18, subdivisions (a) and (b).

Section 1170.18, which was also added by Proposition 47, "creates a process where persons previously convicted of crimes as felonies, which would be misdemeanors under the new definitions in Proposition 47, may petition for resentencing." (*Sherow*, *supra*, 239 Cal.App.4th at p. 879.) Section 1170.18, subdivision (a) specifies that a person may petition for resentencing in accordance with section 490.2, which provides, in pertinent part: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . ." (§ 490.2, subd. (a).)

"[A] petitioner for resentencing under Proposition 47 must establish his or her eligibility for such resentencing." (*Sherow*, *supra*, 239 Cal.App.4th at p. 878.) The petitioner has the "initial burden of proof" to "establish the facts upon which his or her eligibility is based." (*Id*. at p. 880.) If the crime under consideration is a theft offense, " 'the petitioner will have the additional burden of proving the value of the property did not exceed $950.' " (*Id*. at p. 879.) In making such a showing, "[a] proper petition could certainly contain at least [the petitioner's] testimony about the nature of the items taken." (*Id*. at p. 880.) If the petition makes a sufficient showing, the trial court "can take such action as appropriate to grant the petition or permit further factual determination." (*Ibid*.)

The trial court erred in rejecting Andon's petition out of hand by concluding that convictions pursuant to Vehicle Code section 10851 fall outside the scope of Proposition 47. While Proposition 47 does not list Vehicle Code section 10851 by name or number, section 490.2 unambiguously includes the conduct prohibited under that

statute: "[O]btaining *any property* by theft where the value of the money, labor, real or *personal property* taken does not exceed nine hundred fifty dollars ($950) *shall* be considered petty theft and *shall* be punished as a misdemeanor . . . ." (§ 490.2, subd. (a), italics added.) It is undoubtedly true that a vehicle is personal property and thus falls within the ambit of section 490.2.

Vehicle Code section 10851 punishes "[a]ny person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle . . . ." (Veh Code, § 10851, subd. (a).) Our California Supreme Court has held, "[Vehicle Code Section 10851] defines the crime of unlawful driving *or* taking of a vehicle. Unlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession is a form of theft, and the taking may be accomplished by driving the vehicle away. For this reason, a defendant convicted under [Vehicle Code] section 10851[, subdivision] (a) of unlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession has suffered a theft conviction . . . ." (*People v. Garza* (2005) 35 Cal.4th 866, 871.)

Vehicle Code section 10851 applies to all vehicles unlawfully taken or driven, regardless of value. Therefore, the taking of a vehicle worth $950 or less by a person who intends to permanently deprive the owner of his or her title to or possession of the vehicle is a theft crime. However, section 490.2, subdivision (a) now punishes the theft of any personal property worth $950 or less as a misdemeanor, "[n]otwithstanding . . . any other provision of law defining grand theft . . . ."

It follows that if a person convicted of violating Vehicle Code section 10851 took a vehicle worth $950 or less with the intent to permanently deprive the owner of its possession such conduct is now petty theft, and the prior conviction is eligible for resentencing as a misdemeanor under Proposition 47. The trial court erred in concluding

that Andon's conviction was presumptively ineligible for redesignation under Proposition 47.

In his briefing, Andon asserts that he is entitled to have his vehicle theft conviction redesignated as a misdemeanor because the value of the vehicle which was stolen (a 1992 Honda Accord) was less than $950. However, he submitted no evidence, such as a declaration or other documentary evidence, in support of his original petition.[3] Therefore, there is nothing in the record on appeal which demonstrates prejudicial error. Because Andon has failed to demonstrate prejudicial error, we must affirm but we will affirm without prejudice.

III. DISPOSITION

The order denying defendant's Proposition 47 petition is affirmed without prejudice to subsequent consideration of a petition setting forth evidence on the question of whether the stolen vehicle was valued at $950 or less.

[3] The form petition Andon prepared and filed—without assistance of counsel—does not address the valuation issue at all, nor does it indicate anywhere on its face that supporting evidence can or should be attached for the court's consideration. Consequently, it would be unfair not to allow Andon the opportunity to renew his petition and provide whatever evidence he believes would establish the value of the 1992 Honda Accord. It should be noted that even a declaration regarding the fair market value of the vehicle could be sufficient to set the matter for an evidentiary hearing. (See *Sherow*, *supra*, 239 Cal.App.4th at p. 880 [a proper resentencing petition "could certainly contain at least" the petitioner's testimony about the stolen item, and on a sufficient showing the trial court "can take such action as appropriate to grant the petition or permit further factual determination"].)

Premo, J.

I CONCUR:

Rushing, P.J.

WALSH, J., Concurring

The majority concludes that the offense of unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)) may be redesignated as a misdemeanor under Proposition 47. Respectfully, I concur in the judgment only.

Andon's offense is not expressly enumerated in Proposition 47 as eligible for redesignation. Because the plain language of Proposition 47 explicitly makes certain theft related offenses eligible for redesignation, and because Andon's offense is not among them, I conclude the voters did not intend to include his offense within the ambit of the proposition. This construction follows from the canon of *expressio unius est exclusio alterius*. "It is a settled rule of statutory construction that 'where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed.' " (*Quarry v. Doe I* (2012) 53 Cal.4th 945, 970, quoting *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195.)

Accordingly, I would hold that Andon's offense is ineligible for redesignation under Proposition 47, and I would affirm the trial court's order denying his application.

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WALSH, J.[*]

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[*]Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.